THE STATE OF NEW HAMPSHIRE

Department of Environmental Services
WATER COUNCIL

Appeal of Daniel and Margaret Osborn
Docket No. 05-17-WC

RECEIVED
FEB 10 2006

STATE'S MEMORANDUM OF LAW

NOW COMES the New Hampshire Department of Environmental Services ("Department"), by and through its attorneys, the Office of the Attorney General ("State"), and respectfully submits this memorandum of law.

SUMMARY OF THE ARGUMENT

This case presents a legal issue on the interpretation of the variance provision of the Shoreland Protection Act, RSA chapter 483-B ("Shoreland Act"). On April 20, 2005, the Appellants requested a variance pursuant to RSA 483-B:9, V(g) in order to construct elements of their proposed home closer than 50 feet from the reference line. The Department denied the variance because RSA 483-B:9, V(g), the variance provision for the "minimum standards" found in Section 9 of the Shoreland Act, does not apply to the 50-foot primary building setback. The Council should find that the Department properly denied the Appellants a variance under RSA 483-B:9, V(g).

STATEMENT OF FACTS

The Appellants own a parcel of land located on Big Island Pond, in Atkinson, New Hampshire more particularly described as Town of Atkinson Tax Map 22, Lot 57 (the "Property"). See Exhibit A. On September 29, 2004, the Appellants, through their attorney, requested clarification from the Department regarding the 50-foot setback provision found within

the Shoreland Act as it applied to the Property. See Exhibit B. No structure existed on the Property at the time of this request. The Appellants asked whether the lot could be developed pursuant to RSA 483-B:10 or whether they could obtain a variance from the 50-foot setback pursuant to RSA 483-B:9, V(g). Id. The Department responded by letter on October 8, 2004, stating that the variance provision in RSA 483-B:9, V(g) did not apply to the 50-foot setback requirement. See Exhibit C. The Department stated, instead, that the Appellants could submit a written request for a decision as to whether their proposed project could be approved pursuant to RSA 483-B:10.[1] Id. On October 15, 2004, the Appellants acknowledged by letter their understanding that analysis under RSA 483-B:10 was the correct procedure for structures proposed closer than 50 feet from the reference line. See Exhibit D.

On November 15, 2004, the Department received an email from the Appellants stating that the Appellants had developed a design for a proposed home. See Exhibit E. As designed, the home would include a cantilevered deck that would encroach 8 feet into the required 50-foot setback. See Exhibit A. This deck was 8 feet wide and approximately 50 feet long. Id. The Appellants requested advice on how to obtain authorization for this deck. See Exhibit E. On December 7, 2004, the Department wrote a letter to the Appellants stating that, based on the submitted design, it was possible to construct a fully functional two-bedroom home completely outside of the 50-foot setback. See Exhibit F. The home could even be constructed with a smaller cantilevered deck. For this reason, the Department informed the Appellants that their home, as proposed with the 50-foot deck, could not be approved under any section of the Shoreland Act. Id. The Department also stated that, as a procedural matter, the Appellants could

[1] RSA 483-B:10 provides that the Commissioner may, in special circumstances, allow single-family residences to be constructed closer than 50 feet to the reference line on nonconforming, undeveloped lots of record. See RSA 483-B:10, I (2001).

seek an appeal of this decision after a formal denial of a variance request using the Request for Shoreland Variance form. Id.

On April 20, 2005, the Appellants submitted a Request for Shoreland Variance form to the Department. See Exhibit G. At approximately the same time, and prior to receiving either a formal approval or denial from the Department, the Appellants began construction of their proposed residence.[2] The residence featured a smaller cantilevered deck. The Department asked the Appellants whether the building and this deck would meet the 50-foot setback. On May 23, 2005, the Appellants stated that both the house and the balcony would meet the required 50-foot setback. See Exhibit H. The Department later confirmed that the residence with the smaller cantilevered deck would be located behind the 50-foot setback. The Department has, therefore, never sought removal of the smaller, cantilevered deck.

On August 30, 2005, the Department officially denied the Appellants' request to construct a residence with the larger 50-foot long deck that would encroach up to 8 feet on the 50-foot setback. See Exhibit I. The Appellants filed an appeal of this decision on September 27, 2005.

On December 5, 2005, the Water Council conducted a pre-hearing conference in this matter. At the pre-hearing conference, it was agreed that the Water Council would not be able to review the substantive portion of the Appellants' claim until a legal issue was resolved. The legal issue involves an assertion by the Department that RSA 483-B:9, V(g) cannot be used to provide a variance for the Appellants' proposed deck

[2] The Appellants may have begun construction prior to submitting the Shoreland Variance Request form but the Department has not made a definitive conclusion with respect to this factual allegation.

STATUTORY INTERPRETATION

I. The Minimum Standards, to Which the Variance Provision Applies, are Found Entirely Within Paragraph V of Section 9.

RSA 483-B:9, II(b) prohibits construction of any primary structure, such as a single-family residence, within 50 feet of the reference line. RSA 483-B:9, II(b) (Supp. 2005). The Appellants argue that the variance provision of RSA 483-B:9, V(g) applies to the 50-foot setback described in RSA 483-B:9, II(b) because the provision is found within section 9. RSA 483-B:9, V(g) states:

> The commissioner shall have the authority to grant variances from the minimum standards of this section. Such authority shall be exercised subject to the criteria which govern the grant of a variance by a zoning board of adjustment under RSA 674:33, I(b).

RSA 483-B:9, V(g) (Supp. 2005)(emphasis added). The State agrees that the word "section" denotes the entirety of RSA 483-B:9. However, the minimum standards in B:9, to which subparagraph V(g) is intended to apply, are wholly contained within paragraph V. Three reasons support the conclusion that it was the intent of the legislature to have the variance provision apply only to the minimum standards described in paragraph V.

First, the structure of RSA 483-B:9 indicates that the variance provision was intended to apply to paragraph V only. The variance provision is a subparagraph of paragraph V. Had the legislature intended it to apply to the other paragraphs, it would have included it as a separate paragraph. When interpreting a statute, one must look not just to a particular word or phrase in isolation, but to "the composition and structure" of the entire statute. State v. Barnett, 147 N.H. 334, 339 (2001). See also Fillmore v. Fillmore, 147 N.H. 283, 285 (2001)(quotation omitted). The composition and structure of the Shoreland Act indicates that subparagraph (g) was intended to apply to the paragraph of which it is a part. The Appellants speculate that its inclusion was an oversight on the part of certain proponents of the bill. However, the New Hampshire Supreme

Court has stated that the courts "may not interpret statutes to conform to legislative intent not fairly expressed in the language of the statute." In re The Estate of Borkowski, 120 N.H. 54, 57 (1980). The courts must "neither consider what the legislature might have said nor add words that it did not see fit to include." Hutchins & a. v. Peabody & a., 151 N.H. 82, 84 (2004). In other words, neither the courts, nor this Council, may speculate as to what the legislature might have intended to do differently. Rather, this Council must examine what the legislature actually did.

Second, the language of RSA 483-B:9 indicates that subparagraph (g) applies only to paragraph V. The introduction to paragraph V states: "The following minimum standards shall apply to the protected shoreland...." RSA 483-B:9, V (Supp. 2005)(emphasis added). Conversely, paragraph II states: "Within the protected shoreland, the following restrictions shall apply...." RSA 483-B:9, II (Supp. 2005)(emphasis added). This indicates that the intent was to make the "restrictions" in paragraph II separate from the "minimum standards" in paragraph V. In response to this, the Appellants point out that section 9 is entitled: "Minimum Shoreland Protection Standards." However, the title of a statute, or section, is not conclusive of its interpretation. Appeal of CNA Ins. Companies (N.H. Comp. Appeals Bd.), 143 N.H. 270, 274 (1998). In fact, section 9 clearly contains many paragraphs that are not minimum standards. For instance, paragraph I, describes the general purpose of the section. Paragraphs III through VI-d provide specific permission for specified activities and so can certainly not be considered minimum standards. Similarly, paragraph II, instead of providing "minimum standards" subject to a variance, contains "restrictions." In other words, paragraph II contains activities that are prohibited.

Finally, the Appellants' interpretation would make both RSA 483-B:10, which provides limited exemptions for nonconforming lots, and RSA 483-B:11, which provides limited exemptions for nonconforming structures, superfluous.[3] If an applicant could always apply for a variance, there would be no need for the specific exemptions found in those two sections. The New Hampshire Supreme Court has stated: "It is elementary that the legislature should not be presumed to do an idle and meaningless act." Kalloch v. Bd. of Trustees, N.H. Retirement Sys., 116 N.H. 443, 445 (1976). This would be contrary to the well-accepted presumption that the legislature does not use "superfluous or redundant words." Pennelli v. Town of Pelham, 148 N.H. 365, 367-8 (2002). See also State v. Gifford, 148 N.H. 215, 217 (2002)(courts will presume that legislature does not enact unnecessary and duplicative provisions). Instead, if the language in a statute "may reasonably be construed to have some purpose and effect, it must be read in that light." Kalloch at 445. Once it is determined that the proposed residence can be constructed beyond the setback, the applicant may not circumvent the Commissioner's decision by requesting a variance under any other provision such as RSA 483-B:9, V(g).

The Appellants cite to legislative history quoting the testimony of Richard deSeve.[4] Mr. deSeve appeared before the legislative committee as a private attorney representing private interests and his opinion is not disparities of the issues of statutory interpretation or legislative intent. Although Mr. deSeve did have a conversation with one legislator, a legislator's construction of a statute is "neither conclusive nor binding." Frizz ell & a. v. Charlestown, 107

[3] The Council should be aware that review under these sections does not guarantee that an applicant's project will be approved. To the extent a project can meet the requirements of the Shoreland Act, it must do so. As stated by the Coos County Superior Court, "[t]he plain language of this section gives the DES Commissioner authority to review proposed development projects and impose conditions so that the project will adhere to the requirements of CSPA as much as possible." State v. Marino, Order on Petitioner's Motion for Partial Summary Judgment and Respondents' Cross-Motion for Summary Judgment, issued by the Coos County Superior Court on January 6, 2006, page 10 (attached as Exhibit J).

[4] The Council should note that Richard deSeve did not represent the State at the legislative hearing and is not, and has never been, staff counsel for the Department.

NH 286, 289 (1966)(referring to the Legislature's interpretation of a statute). In addition, in the remainder of the legislative history, the State has found no other reference to the use of RSA 483-B:9, V(g) as a variance to the 50-foot setback requirement.

II. The Statute, As Interpreted by the Department, Creates No Constitutional Problem.[5]

The Appellants have asserted that application of the statute as interpreted by the Department poses a constitutional problem. It is unclear from the Appellants' brief whether they are making a facial challenge to the statute as a whole or a challenge to the statute as applied to them. Therefore, the State cannot provide a complete and specific legal response. However, under no analysis does the Department's interpretation create a constitutional problem.

First, the statute is designed to provide for environmental protection and is not, strictly speaking, a zoning ordinance. The language cited by the Appellants, both in Justice Horton's dissent in Grey Rock's Land Trust v. Town of Hebron, 136 N.H. 239, 246 (1992) and in Simplex Technologies v. Town of Newington, 145 N.H. 727, 731 (2001), pertains to the "unnecessary hardship" prong of the statute designed for zoning ordinances. By specific reference, this statute also applies to the variance provision in RSA 483-B:9, V(g). It is not, however, referenced in either of the specific exemption provisions found within the Shoreland Act. RSA 483-B:10 and RSA 483-B:11 provide their own standards for allowing otherwise nonconforming structures. These standards are sufficient to pass constitutional scrutiny.

Second, the statute specifically provides for at least two "safety valves." These are found in section RSA 483-B:10 and RSA 483-B:11. There is no constitutional requirement that a statute provide for redundant "safety valves." The Department's interpretation is, therefore,

[5] Although briefed in their memorandum, the State believes that the Appellants did not properly preserve the constitutional issue in their Appeal of the Denial of the Shoreland Protection Variance.

constitutionally sound. The New Hampshire Supreme Court has ruled that "[a] statute will not be construed as unconstitutional, where it is susceptible to a construction rendering it constitutional." White & a. v. Barrington Tax Collector, & a., 124 N.H. 69, 77-8 (1983).

In addition, there is no constitutional requirement that nonconforming uses be permitted to expand or that conforming uses be allowed to become nonconforming. In Colby v. Town of Rye, 122 N.H. 991 (1982), an applicant requested permission to build a new porch onto an already nonconforming home. The town board of adjustment denied the request. On appeal, the New Hampshire Supreme Court supported the denial stating that although the continuance of nonconforming uses is protected by the constitution, "expansion of such use into a new area may be prohibited." Id.

CONCLUSION

The structure of RSA 483-B:9 indicates that the variance provision was only intended to apply to paragraph V of which it is a part. The language of the section also indicates that paragraph V alone contains the "minimum standards" of RSA 483-B:9. To allow the variance provision to apply to nonconforming, undeveloped lots would render the specific exemption found in RSA 483-B:10 superfluous and duplicative. Once a decision is made pursuant to RSA 483-B:10, an applicant cannot circumvent that decision by seeking a variance under RSA 483-B:9, V(g).

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Kelly A. Layette
Attorney General

Date: February 10, 2006

K. Allen Brooks
Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3679

CERTIFICATE OF SERVICE

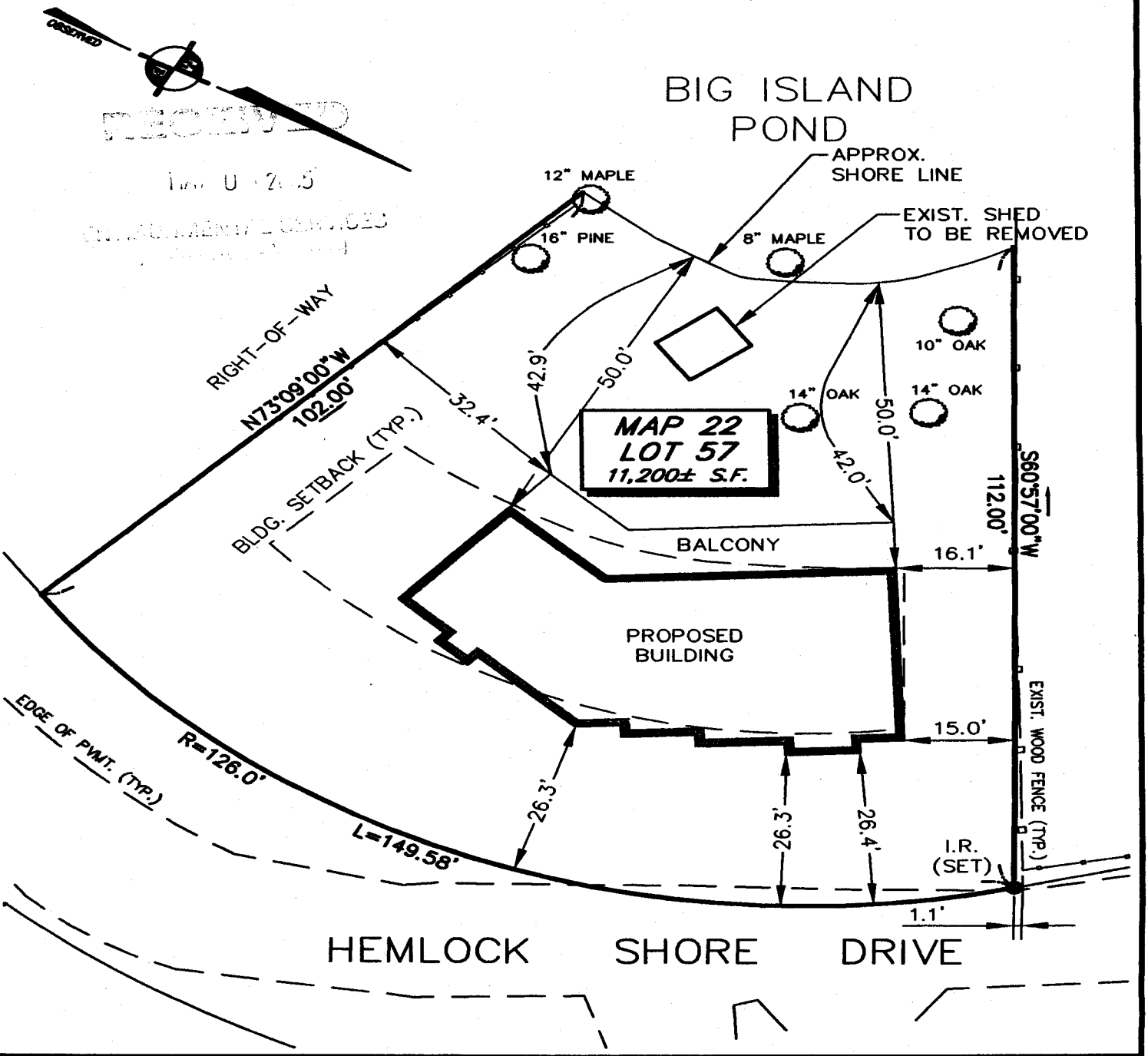
I hereby certify a that a copy of the foregoing Memorandum of Law has on this 10th day of February 2006, been mailed first class postage prepaid to Bernard H. Campbell, Esquire.

K. Allen Brooks

Exhibit A

[Exhibit A has been reduced slightly. Please be aware that, for this reason, the 1" = 20' scale is no longer accurate]

PROPOSED PLOT PLAN
TAX MAP 22 LOT 57, HEMLOCK SHORE DRIVE
ATKINSON, NEW HAMPSHIRE



MINIMUM BUILDING SETBACKS

FRONT – 30 FEET
SIDE – 15 FEET
REAR – 50 FEET

I CERTIFY TO THE ATKINSON BUILDING DEPT THAT THE EXISTING FOUNDATION AS SHOWN DOES NOT CONFORM WITH THE TOWN OF ATKINSON ZONING REGULATIONS REGARDING SETBACKS FROM STREET LINES AND LOT LINES

PLAN IS INVALID WITHOUT RED SURVEYOR'S SEAL

STATE OF NEW HAMPSHIRE — LICENSED LAND SURVEYOR — 732 KURT MEISNER — SIGNATURE

MEISNER BREM CORPORATION
151 MAIN STREET, SALEM, NH 03079 (603) 893-3301
142 LITTLETON ROAD, SUITE 16, WESTFORD, MA 01886 (978) 692-1313

SUBDIVISION
NAME: OSBORN
SCALE: 1"= 20'
DATE: 12-07-04
REV.: 02-16-05

JOB NO. 6872.00

Exhibit B

Beaumont & Campbell Prof. Ass'n.
Attorneys

ONE STILES ROAD - SUITE 107
SALEM, NEW HAMPSHIRE 03079
Tel: 603-898-2635 • Fax: 603-894-6678

URVILLE J. BEAUMONT
(Also admitted in MA)

BERNARD H. CAMPBELL

September 29, 2004

Mr. Callus Adams
New Hampshire Department of
Environmental Services
P.O. Box 95
Concord, New Hampshire 03302-0095

RE: Shoreland Protection Act

Dear Sir:

You may recall that we exchanged communication regarding a Shoreland Protection Act Waiver for Mr. and Mrs. Daniel Osborn for alterations to a cottage on an island in Big Island Pond in Atkinson. I am now asking for your assistance on another question involving application of RSA 483-B to land in Atkinson.

My clients own a lot of land on the shore of Big Island Pond in Atkinson. The lot is undeveloped. It has received DES approval for a septic system, which will be at least 75 feet from the reference line. RSA 483-B:9(V)(b)(2)(A)(iii). My clients wish to build a new residential structure (2 bedroom) to within 41 feet of the reference line, with an adjacent deck to be within 31 feet of the reference line.

It is my understanding that no waivers or other permissions are needed under RSA 483-B because:

i) The vacant lot may be developed under RSA 483-B:10.
ii) That because Atkinson has a 100 foot structure setback, (for which a variance is being requested), the exemption from application contained in RSA 483-B:19 may apply.

If my interpretation of the exemptions are incorrect, then I assume that the 50 foot setback in RSA 483-B:9(II)(a) would apply, and that a waiver under RSA 483-B:9(V)(9) would be required.

10/8
Carole Hall
362-4857
Busy

I would appreciate your responding to my office and confirming that the cited exemptions apply and that no Shoreland Protection Act waivers would be required in this case.

Yours truly,

Bernard H. Campbell

BHC/pdc
cc: client

pdc/letters/nhdeptenvserv/Osgood

Exhibit C

State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES
6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-2147 FAX (603) 271-6588

October 8, 2004

Bernard H. Campbell
Beaumont & Campbell Prof. Ass'n
1 Stiles Rd, Suite 107
Salem NH 03079

Re: September 29, 2004 inquiry pertaining to shoreland setbacks

Dear Mr. Campbell:

The Wetlands Bureau has reviewed the circumstances you outlined pertaining to your client's property on Big Island Pond in Atkinson and noted several potential conflicts with RSA 483-B, the Comprehensive Shoreland Protection Act (the "CSPA").

The town of Atkinson had an established 100 ft primary building setback prior to January 1, 2002, and therefore, they may retain that setback. The existence of that setback does not create any type of exemption from the provisions of the CSPA. RSA 483-B:19 allows towns which adopt shoreland protection ordinances to assume primary regulatory authority only if the ordinances have been certified by the Office of State Planning, or its successor, as being at least as stringent as the relevant portions of the CSPA. Atkinson has not had any shoreland ordinance certified for this purpose.

While the town of Atkinson does not have a certified shoreland ordinance it does have the authority to enforce its pre-existing 100 ft setback. The language in RSA 483-B:10 clearly states that it is to be applied "in addition to any local requirements." The town may vary its own setback, as appropriate, down to the 50 ft minimum setback established in the CSPA. The town does not have the authority to issue variances to the state established 50 ft primary building setback. Neither the town nor the Commissioner of the Department has the authority to grant variances to the primary building setback. The Commissioner's ability to grant variances is limited to the minimum standards found in RSA 483-B:9, V. The primary building setback is established in RSA 483-B:9, II, and therefore, may not be varied.

Your letter describes the lot in question as "undeveloped" but does not state whether or not the lot is non-conforming. If the lot is non-conforming, then you are correct that RSA 483-B:10 allows the construction of a single family dwelling on the lot provided that it is not otherwise prohibited by law. The design and placement of the structures proposed on non-conforming lots shall comply with the minimum standards and intent of the CSPA to the maximum extent possible. In order to facilitate the provision in RSA 483-B:10, authorizing the Commissioner to impose additional conditions when necessary to more nearly meet the intent of the chapter, the Department requires that property owners submit a written description with project plans to the Department for review. Owners will subsequently be notified, in writing, as to whether or not they qualify to proceed under RSA 483-B:10, and if any additional conditions will be imposed.

It has also been noted that the proposal includes a 10 ft wide deck to be constructed between the proposed home and the reference line. There is an exception found in RSA 483-B:11, I allowing the construction of decks within the primary building setback, however, it applies only to existing non-conforming structures constructed prior to 1994. The construction of a deck between the proposed new structure and the reference line would be prohibited. A deck may be constructed off a different side of the home provided it does not decrease the setback to the reference line.

To summarize, lot in question is subject to the local setback ordinance and the owner should proceed with the town accordingly. Once the necessary approvals have been obtained locally, please submit detailed plans and construction sequences of the proposed construction with a cover letter requesting confirmation that the project meets the criteria found in RSA 483-B:10, to the Department,

through the Wetlands Bureau. The Department will provide a written response explaining any additional conditions imposed.

If you have any further questions, please don't hesitate to contact me at (603) 271-2147.

Sincerely,

D. Forst
Shoreland Section Supervisor
DES Wetlands Bureau

cc: Mr. & Mrs. Daniel Osborn
Collis Adams, Administrator, DES Wetlands Bureau
Allen Brooks, NH Dept. of Justice
Atkinson Conservation Commission
Atkinson Board of Selectmen
Atkinson Planning Board

Exhibit D

CLIENT'S CC

Beaumont & Campbell Prof. Ass'n.
Attorneys

ONE STILES ROAD - SUITE 107
SALEM, NEW HAMPSHIRE 03079
Tel: 603-898-2635 • Fax: 603-894-6678

URVILLE J. BEAUMONT
(Also admitted in MA)

BERNARD H. CAMPBEI

October 15, 2004

Mr. D. Forst
New Hampshire Department of Environmental Services
6 Hazen Drive
P.O. Box 95
Concord, New Hampshire 03302-0095

Re: Shoreland Protection Act / Setback Relief

Dear Sir:

Thank you for your letter of October 8, 2004. I can indeed confirm that the lot in question is both "non-conforming" and "undeveloped". Therefore, in accordance with Paragraph #4 of your letter, I gather that my clients would be entitled to construct a dwelling notwithstanding the 50 ft. setback, provided the details were submitted as you outlined, and that the design was intended to comply "to the maximum extent possible".

I had one other observation in your letter related to the submittal process. The last paragraph on Page One suggests that an applicant should pursue the local approvals first, and then submit the State approval request. The Atkinson Zoning Board of Adjustment apparently wishes the opposite procedure, to wit: obtain a State waiver before submitting for the local variance. If there is some guidance which you could point to which makes clear the "order of applications", it would be helpful.

I am looking forward to hearing from you shortly.

Yours truly,

Bernard H. Campbell

cc: Clients
Atkinson Building Department

BHC:sjt
Planning/Letters/Osborn-DES

Exhibit E

maggie Osborn

From: maggie Osborn <damosborn@comcast.net>
To: <Ms. Darlene Forst>
Sent: Friday, November 12, 2004 10:16 AM
Subject: Osborn property on Big Island Pond in Atkinson

Ms. Darlene Forst
Shoreland Section Supervisor
Des Wetlands Bureau
NDES
6 Hazen Drive
P.O Box 95
Concord, New Hampshire 03302-0095

Dear Ms. Forst,

Thank you for your time on the phone last week in regards to our property on Big Island Pond in Atkinson. When last we spoke we talked about our non-conforming lot and how to comply with the minimum standards and
intent of the CSPA to the maximum extent possible.

Since that conversation, we meet with the Atkinson Town Zoning Board on their regularly schedule meeting date (November 10). We presented a plan that meets the CSPA required set back of 50 feet or greater. Our plan shows a 51 foot set back from the shore line. The board seemed willing to grant approval at that setback. To obtain that distance, we would also be seeking a town Variance for relief from the front setback. The required setback is 30ft. The plan reflects a 23ft. setback. The board felt it would be possible to grant that setback as well, to maximize distance from the shore line. As you will see on the plan enclosed there is also a 8ft. wide cantilevered balcony along the back of the house that would not meet the 50 foot CSPA. The board did not seem opposed to the possibility of permitting this, but did say that the state is the only one who has jurisdiction to grant this use.

The balcony is needed to access the back yard from the main living area. The basement/foundation plan as well as garage are at ground level with the kitchen and living area above if on the second floor. The only access to the back yard from the main living area would require this balcony. Originally if you recall there was a ten foot deck planned on the back. That has been removed from the plan and replaced with a smaller open cantilevered balcony. The balcony would be used as a walkway along the back of the house. The plan does not accommodate room to construct any type of deck or walkways off to either side of the home. An open cantilevered balcony is constructed to the home and does not touch the ground. It will not prohibit the flow of water and would be made of environmental friendly material.

Another question was raised at the meeting in regards to what the state guidelines are for paved areas on a non-conforming lot.

In closing we are seeking state advice or approval for balcony as well as paved areas on the plan enclosed to present to the Zoning Board at the next upcoming meeting. Meeting is scheduled for December 9.

Thank you for your time and consideration on these matters. If you have any questions on the above you can reach me at (617) 838-1233.

Sincerely,

11/12/04

Exhibit F

State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES
6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-2147 FAX (603) 271-6588

NHDES

M of F 8-4

December 7, 2004

Daniel & Margaret Osborn
PO Box 808
Hampstead NH 03841

Re: Proposed development of Lot 57, Tax Map 22 in Atkinson

Dear Mr. & Mrs. Osborn:

I would like to thank Mrs. Osborn for taking the time to meet with me and Shoreline Investigator, Chris Brison, this morning to discuss your proposed development of Lot 57, Tax Map 22, on Island Pond, in Atkinson. This letter shall serve to confirm the Department of Environmental Services' ("DES") position with regards to the construction the proposed cantilevered balcony extending into the primary building setback. The fact that the balcony would be cantilevered has no bearing on DES' position. This position would remain consistent whether the proposal were for a balcony, deck, patio, open porch or any other similar structure extending into the primary building setback off the primary building. As discussed, there are three sections of the Comprehensive Shoreland Protection Act ("CSPA") that address construction relative to the primary building setback; RSA 483-B:9 Minimum Shoreland Protection Standards, section II, RSA 483-B:10 Nonconforming Lots of Record, and RSA 483-B:11 Nonconforming Structures.

RSA 483-B:9, II applies to all new construction within the protected shoreland and establishes the primary building setback at a distance of 50 ft from the reference line. As explained in DES' letter to your counsel on October 8, 2004, the setback is not one of the standards to which DES may issue variances. There is no language found within RSA 483-B:9 that would allow DES to issue a variance or otherwise authorize the requested cantilevered balcony within the primary building setback.

The subject lot is currently undeveloped with no existing nonconforming primary structure therefore RSA 483-B:11, which allows consideration of impacts within the primary building setback provided the resulting conditions more nearly conform to the intent of the act than current conditions does not apply. The provision to allow a deck or open porch extending into the primary building setback is limited to structures constructed prior to July 1, 1994. It does not authorize such impacts relative to new primary structures. There is no language found within RSA 483-B:11 that would allow DES to authorize the requested cantilevered balcony within the primary building setback.

The subject lot can accommodate a 2 bedroom home and an appropriately sized septic without encroaching upon the setbacks to the reference line established in the CSPA therefore the site shall not be considered a nonconforming lot of record. There is no method by which RSA 483-B:10 could be used to allow DES to authorize the requested cantilevered balcony within the primary building setback.

In summary, the subject lot is a conforming lot of record and the CSPA requires all new primary structures on conforming lots to be located completely behind the primary building line. There is no method available to DES by which relief of the setback requirement could be offered to allow the proposed cantilevered balcony. This letter does not constitute a denial action by DES as no application of any kind has been received. If you wish to pursue the proposed cantilevered balcony further with DES you should do so by filing an application for a variance to RSA 483-B:9, II. As stated this morning DES will deny the request, however doing so will allow you to proceed through the appeal process outlined in

the statute. If you choose to pursue this option, you may do so either before, after, or simultaneous to your pursuit of the necessary local approvals. If you have any further questions please do not hesitate to call our office at (603) 271-2147.

Sincerely,

D. Forst
Shoreland Section Supervisor
DES Wetlands Bureau

Atkinson Planning Board
Atkinson Conservation Commission
Bernard H. Campbell

Exhibit G

RECEIVED

NEW HAMPSHIRE DEPARTMENT OF Environmental Services

Request for Shoreland Variance

RSA 483-B:9, V(g)

Wetlands Bureau
P.O. Box 95, 29 Hazen Drive
Concord, NH 03302-0095

GENERAL INSTRUCTIONS: Type or print clearly; missing information may delay your request. Use a separate form for each variance requested.

1. NAME OF OWNER: Osborn (Last) Daniel (First) Joseph (Middle)

MAILING ADDRESS: PO Box 808 (Street/Box #) Hampstead (Town/City) NH (State) 03841 (Zip)

617-838-1233 (TELEPHONE) damosborn@comcast.net (EMAIL)

2. LOCATION OF PROPERTY FOR WHICH A VARIANCE IS BEING REQUESTED: 40 Hemlock Shore Drive (Street/Box #) Atkinson (Town/City)

TAX MAP #s: 22 LOT #s: 57 BLOCK #s:

3. NAME OF WATERBODY: Big Island Pond

4. NAME OF APPLICANT:

(If different than owner) (Last) (First) (Middle)

MAILING ADDRESS: (Street/Box #) (Town/City) (State) (Zip)

(TELEPHONE) (FAX) (EMAIL)

5. DESCRIPTION OF VARIANCE REQUESTED:

STANDARD: RSA 483-B:9, V (e.g. RSA 483-B:9,V(b)(2)(A)(i) says the leachfield must be 125 feet from the reference line.)	RSA 483-B:10 Nonconforming Lots of Record
HOW DO YOU WISH TO VARY FROM THIS STANDARD? Briefly describe the relief requested. (e.g. "Setback of less than 125 feet from reference line for septic system," RSA 483-B:9, V (b)(2)(A)(i).")	Allow a deck to be constructed 42 feet from the primary building set back were 50 feet is required.

Please print single sided

REV 4-8-04

6. JUSTIFICATION FOR THE VARIANCE: On separate pages, provide documentation of the reasons for the necessity of the requested variance. Plans and photographs should be attached as part of your explanation. Describe what reasonable use of your property you would be denied if you had to comply with the literal meaning of the standard. An example would be a lot-of-record in which the only reasonable location for constructing a septic system is closer to the reference line because of the physical features of the property. Your narrative must address each of the following points:

- ***The literal enforcement of the standard would result in an unnecessary hardship.*** To establish unnecessary hardship you must prove that the standard for which you are requesting the variance:
  1. Would interfere with the reasonable use of the property, considering the unique setting of the property in its environment.
  2. Has no fair and specific relationship between the general purposes of RSA 483-B and the restrictions on your property.
  3. Does not injure the public or private rights of others when applied to your property.

- ***Granting a variance will not result in the diminution in value of surrounding properties.*** You must demonstrate that granting the variance would not cause diminution of surrounding property values. To do this, you must show that the variance is consistent with the existing neighborhood and adjoining shoreline, will not result in a nuisance, and will not diminish the reasonable use of neighboring properties.

- ***The variance would not be contrary to the spirit of RSA 483-B.*** RSA 483-B:2 declares that the standards are necessary to protect the public waters of the State of New Hampshire, and lists 16 specific purposes for those standards. You must show that a variance, as applied to your specific property, would not be contrary to any of those purposes.

- ***Granting variance would not be contrary to the public interest.*** The public waters of New Hampshire are valuable resources held in trust by the State, and the public has an interest in protecting those waters and shorelines from degradation. You must show that a variance would not interfere with the greater public benefit.

- ***Granting variance would do substantial justice.*** You must show that granting the variance would be a fair and reasonable decision. One way to do this is to show that, in combination with mitigating measures, the net result will have the same or greater protection for the public water as meeting the standard itself. Mitigating measures include providing additional protections above and beyond the minimum standards. For example: Re-establishing a natural woodland buffer along a section of shoreline that was cleared prior to the enactment of RSA 483-B could be used to balance the impact of a septic system being built closer to the public water. Merely meeting the requirements of another standard or jurisdiction would not be considered a mitigating measure.

7. SIGNATURES: The signature(s) below certifies that a copy of this application, with all attachments, has been provided to the municipal conservation commission in the city or town where the property is located (or selectmen if there is no conservation commission), and that the information provided is true and accurate.

OWNER _____ Date 4-20-05

APPLICANT
If different than owner _____ Date _____

Please print single sided

REV 4-8-04

Maggie Osborn

From: Maggie Osborn [damosborn@comcast.net]
Sent: Tuesday, April 05, 2005 7:50 AM
To: Maggie Osborn
Subject: Osborn Variance Application

The literal enforcement of the standard would result in an unnecessary hardship. See Hardship Addendum.

1) Because the lot was created prior to imposition of shoreline protection standards, the standards unreasonably restrict reasonable use of property. There is no other area were a deck could be constructed. The lot is only 100 ft deep. The house has been placed as far from wetlands as possible. Which required the town to grant a variance of 26.3 ft from the front set back. Because of the slope of the lot the house could not be moved to allow deck to be built within the primary set back required. The size of the lot and design of the house doesn't allow for a deck to be placed on the side. See attached design.

2.) There would be no additional environmental impact because of construction or use of deck. No additional trees would be removed to accommodate deck. No private or public rights are being injured because no diminution in property values is expected and no additional runoff is expected to reach the adjoining surface water.

3.) Construction and use of deck is consistent with residential uses as permitted. See attached photo's of neighboring homes.

Granting a variance will not result in the diminution in value of surrounding properties. The use of the deck is consistent with residential uses permitted. See photo's.
Deck raises the value of property and surrounding property.

The variance would not be contrary to the spirit of RSA 483-B. The construction and use of deck will not result in a negative impact to adjoining wetlands or surface water. No additional trees will be removed, deck will be constructed of environmentally friendly material. Deck will not be enclosed. Deck raises value of subject property, enhancing waterfront values in general; use is consistent with residential uses as permitted zoning.

Granting the variance would not be contrary to public interest. Wetlands set backs and uses were established after lot and its usage was created; requested use is consistent with surrounding uses. Deck will be constructed of new state of the art environmentally friendly materials. Most homes in area have decks much closer to wetlands and were constructed with envormentally threatening materials. Deck will not negatively impact adjoining wetlands or surface water.

Granting the variance would do substantial justice. The lot was originally created as a house lot in the original subdivision; other subdivisions lots have been improved and built in a similar fashion. We have gone to great lengths and expense to construct the home to have the best environmental impact possible within the wetlands. Even though the lot is a non-conforming lot of record it was important to us to move the primary structure as far from the wetlands as possible. With the help of the wetlands bureau, engineers, architects, conservation committee and town officials we were able to do so. If we could of moved the house back eight more feet to accommodate the deck we would of. Because of the steep slope of the property and its non-conforming nature we were not able to do so. There is no place else to put this deck. We need the deck to have a back exit from the main floor of the house. As most decks this will be off the kitchen area. Not granting the variance will restrict us from normal uses of the house and backyard. It will also penalizes us for meeting the primary set back when not required of a non-conforming lot. It is our understanding that if trees are not being removed to construct the deck and that the deck will not be enclosed there will be no additional impact on the wetlands. The deck will be consistent with residential uses in the area.

Osborn Variance Application
Map 22 Lot 57

HARDSHIP ADDENDUM

The Applicant in this case is seeking dimensional (area) variance. Therefore, the hardship criteria are as set forth in the Supreme Court decision of Boccia vs. City of Portsmouth, _____ N.H. _____ (5/25/04).

1) An area variance is required to enable the Applicant's proposed use of the property given the special condition of the property:

   This lot was created prior to zoning and is similar in size to other lots in Hemlock Heights and is, in fact, larger than many other waterfront lots. Without the setback relief, the lot cannot be used for any purpose, because the 100-foot setback and street setbacks nearly overlap.

2) The benefit sought by the Applicant cannot be achieved by some other method reasonably feasible for the Applicant to pursue, other than an area variance:

   The lot is pre-existing, and there is not other available land to acquire, so without the area variance, the property has no reasonable permitted uses. Likewise, the structure cannot be built without setback relief because the setback encompasses most of the lot.

Exhibit H

May 23, 2005

2004 - 2941
1:50

Island Pond
Atkinson

Spoke with Maggie Osborne. Balcony is on 3rd floor. Ms. Osborne stated that the 3rd floor balcony will meet the 50' setback I informed Ms. Osborne that photo recieved by the bureau indicate that the silt fences on site have not been properly installed or maint I explained that the silt fences must be fixed and that the Bureau would be inspecting the site in the near future.

Exhibit I

The State of New Hampshire
Department of Environmental Services

Michael P. Nolin
Commissioner

FILE COPY

August 30, 2005

Daniel and Margaret Osborn
PO Box 808
Hampstead, NH 03841

RE: File #2005-01071 - Daniel and Margaret Osborn - Atkinson
Tax Map/Lot # 22 / 57; Block

Dear Mr. and Mrs. Osborn:

The Department of Environmental Services (DES) Wetlands Bureau has completed its review of your application and has determined that the proposed project to extend a deck over the 50 ft primary building setback off a structure erected subsequent to July 1, 1994 does not comply with the Comprehensive Shoreland Protection Act. The application has therefore been denied.

This decision was determined based on the following findings:

Standards for Approval:

1. In accordance with RSA 483-B:9, II(b), "Primary structures shall be set back behind the primary building line which is 50 feet from the reference line.
2. In accordance with RSA 483-B:11, I, "Between the primary building line and the reference line, no alteration shall extend the structure closer to the public water, except that the addition of a deck or open porch is permitted up to a maximum of 12 feet towards the reference line."

Findings of Fact:

3. On May 5, 2004 the NH Department of Environmental Services received a request for a variance to construct a deck that encroaches 8 ft into the 50 ft primary building line setback off of a new primary structure under construction in 2004 on an undeveloped lot more particularly identified as Atkinson Tax Map 22, Lot 57.
4. As established in RSA 483-B:11, decks can extend up to 12 towards the reference line only if the structure is a nonconforming structure that was erected prior to July 1, 1994. This provision does not allow decks to be constructed, within the primary building setback, to extend from primary structures erected after July 1, 1994.
5. The commissioner may not grant a variance for RSA-B:9 II (b). Variances may only be granted for Section V of RSA 483-B:9 in accordance with RSA 483-B:9 V (g).

Ruling in Support of the Decision:

6. The Department does not have the authority to grant a variance to RSA 483-B:11 to allow the construction of a deck, within the setback, off a primary structure constructed after July 1, 1994. Therefore, the request for a shoreland variance to RSA 483-B:11 has been denied.
7. The Department does not have the authority to grant a variance of the primary building setback established per RSA 483-B:9, II(b). Therefore, the request for a shoreland variance to RSA 483-B:9, II(b) has been denied.

You are hereby informed that the appeal of this decision is to the New Hampshire Water Council. Appeal must be made within 30 days of the date of this letter, in accordance with RSA 149-M, RSA 21-O:9 and RSA-O:14. Filing of the appeal shall be made by certified mail to the chairperson of the council, with a copy to the Department, and shall set forth fully every ground upon which it is claimed that the Department's decision is unlawful or unreasonable.

Sincerely,

Michael P. Nolin
Commissioner
NHDES

cc: Atkinson Conservation Commission
Atkinson Board of Selectmen
Atkinson Municipal Clerk

Exhibit J

THE STATE OF NEW HAMPSHIRE

COOS, SS. **SUPERIOR COURT**

No. 04-E-145

State of New Hampshire
Department of Environmental Services

vs.

Joseph and Rose Marino

ORDER ON PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND RESPONDENTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

The State of New Hampshire Department of Environmental Services ("DES") has filed a petition for a permanent injunction and civil penalties against the Joseph and Rose Marino ("the Marinos") for violations of the Comprehensive Shoreland Protection Act, RSA 483-B ("CSPA"), the Water Pollution and Waste Disposal Act, RSA 485-A ("Water Pollution Act"), and the Fill and Dredge in Wetlands Act, RSA 482-A ("Wetlands Act"). Specifically, DES seeks to enjoin the Marinos from further construction of an unauthorized residential structure, from further grading and placement of unauthorized fill, and from installing a septic system prior to approval by DES. DES also seeks an order requiring the Marinos to: (A) remove the currently unauthorized structure or to reconfigure the structure in accordance with a plan to be approved by the Commissioner of DES; (B) immediately stabilize the unauthorized fill and to permanently remove the fill by a specific date; and (C) pay civil penalties for the described violations, as set forth in the CSPA, Water Pollution Act, and Wetlands Act.

Currently pending before the Court is DES's partial motion for summary judgment, wherein DES argues that there are no disputed issues of material fact, and this Court can find, as a matter of law, that the Marinos: (1) violated RSA 485-A:32 by constructing a building from which wastes will discharge prior to obtaining a permit from DES; (2) violated RSA 482-A:3 by installing an overflow drain without obtaining a dredge and fill permit from DES; and (3) violated RSA 483-B by constructing a primary structure within fifty feet of Back Lake with out DES authorization.

The Marinos object, and have filed a cross-motion for partial summary judgment, asserting

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11/10/06
CC: BROOKS
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that: (1) they do not need a permit under RSA 485-A:32, because the building they are constructing is not one from which sewage or other wastes will discharge; (2) DES's claim that they violated RSA 483-B:9 fails as a matter of law because RSA 483-B:10 allows the owners of nonconforming, undeveloped lots of record to build single family residential dwellings, not withstanding the requirements of the CSPA; (3) DES's claim that they violated RSA 482-A:3 by installing an overflow drain without obtaining a dredge and fill permit is a new claim not alleged in DES's petition, and therefore the Court should dismiss it; (4) DES's failure to promulgate regulations providing for review of projects under RSA 483-B:10 violates their due process rights; and finally (5) RSA 483-B:10 is unconstitutional because it gives the Commissioner of DES unfettered discretion to impose conditions without providing any meaningful objective standards.

After a thorough review of the pleadings, affidavits, and exhibits submitted by the parties, DES's motion for partial summary judgment is GRANTED in part and DENIED in part. The Marino's cross-motion for partial summary judgment is DENIED.

Standard of Review

In acting upon a motion for summary judgment, this Court is required to construe the pleadings, discovery, affidavits and all inferences properly drawn from them in the light most favorable to the non-moving party to determine whether the proponent has established the absence of a dispute over any material fact and the right to judgment as a matter of law. Estate of Joshua T., 150 N.H. 405, 407 (2003). The party objecting to a motion for summary judgment "may not rest upon mere allegations or denials of his pleadings, but his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue [of material fact] for trial." RSA 491:8-a, IV (1997). An issue of fact is material if affects the outcome of the litigation. Panciocco v. Lawyers Title Ins. Corp, 147 N.H. 610, 613 (2002).

Factual Background

For the purposes of this Order, the Court finds the following facts relevant, which facts are drawn from the parties' pleadings. The Marinos own property located at 68 Spooner Road in Pittsburg, New Hampshire, more particularly described on Town of Pittsburg Tax Map U-4, Lot 33-A. The property is approximately .13 acres in size, and has about 150 feet of frontage on Back

Lake. Back Lake is owned by the state of New Hampshire and is held in trust for the benefit of the public. The parties do not dispute that the property qualifies as a "nonconforming, undeveloped lot of record" as defined in RSA 483-B:10. It is also undisputed that the property, given its size and configuration, is not suitable for a state-approved septic system.

On or about October 15, 2004, the Marinos commenced construction of a single-family residential structure on the property, with the intent to move into the structure upon its completion and occupy it as their home. The structure is located between 15 and 20 feet from the edge of Back Lake. At the present date, the structure is nearly completed.

The structure contains various plumbing fixtures, including a pressure tank with pipe connections; three sink fixtures; two toilet fixtures; a shower stall; a washing machine; and a dishwasher. However, none of these fixtures are connected to an activated water source, pursuant to an Order of this Court (Vaughan, J.) dated May 10, 2005 granting DES's motion for a preliminary injunction.[1]

Prior to the Court's May 10, 2005 Order, the Marinos installed an artesian well on the property. DES claims that the Marinos installed an overflow drain for their artesian well in the bank of Back Lake, and that based on the drain's location, the installation required dredging and refilling of a trench for the drain pipe. DES emphasizes that the Marinos never obtained a dredge and fill permit for this work. The Marinos dispute DES's version of the facts. They assert that because of the well's flow rate, and in order to comply with DES's directive against connecting the residence to an activated water source, the contractor suggested that they add an overflow pipe to the system that they could rely upon to disperse excess drinking water. They further argue that the drain pipe is not within the bank of the lake.

Also preceding the Court's May 10th Order, the Marinos purchased a holding tank to collect and contain sewage and wastewater produced from their use of the residential structure. The holding tank is currently located on an adjacent piece of property. The Marinos had obtained the services of a septic designer, in order to design a septic system capable of handling anticipated discharges from the structure, however, they did not apply for or receive septic design approval

[1] The Court's Order prohibits the Marinos from occupying the residence, using plumbing, and discharging waste. The Marinos have fully complied with this Order.

from DES prior to construction.

On October 29, 2004—upon notification that the Marinos were building a structure within 50 feet of Back Lake—DES informed the Marinos by letter and telephone conversation that the residence was being constructed closer than the 50-foot setback required by RSA 483-B:9, and without an approved septic design. DES advised the Marinos to immediately cease all work on the project.

The Marinos met with DES on November 2, 2004 to discuss the construction project. At the meeting, DES staff advised the Marinos that a holding tank for septage could not be used on the property, and that they would either have to purchase additional land suitable for a state-approved septic system or make sure that the structure had no running water. At the meeting DES staff explained that projects closer than 50 feet to the water's edge must be examined by the DES Commissioner pursuant to the CSPA so that the Commissioner can impose suitable conditions, such as restrictions on the building footprint size and location. The Marinos disagreed that the CSPA applied to their property.

To this date, the Marinos have not applied for or received septic design approval from the DES, nor have they received permission from DES or its Commissioner for the construction of a single-family residence within 50 feet of Back Lake. Similarly, the Marinos have not applied for or obtained a "dredge and fill" permit or other authorization from DES for either the placement or installation of the overflow drain.

Discussion

DES's arguments can be summarized as follows. The Marinos are constructing a single-family residence located between 15 and 20 feet of Back Lake. The current location of the residence does not comply with the 50 foot setback requirement mandated under RSA 483-B:9, II(b). The residence is constructed in such a manner that it will utilize water for sinks, toilets, and other water-related fixtures. The Marinos have purchased a holding tank to retain the waste water and sewage generated from the residence. The residence is, therefore, a building from which "sewage or other wastes will discharge," and requires septic approval prior to construction, pursuant to RSA 485-A:32, I. DES maintains that had the Marinos applied for a septic permit, the application would have automatically triggered review for consistency with the CSPA. The DES

Commissioner would then have imposed conditions on the construction project that, as nearly as possible, would have met the substantive requirements of the CSPA. DES asserts that the use of a holding tank on the Marinos' property is specifically prohibited by Env-Ws 1022.03, and would not have been approved. Because no other septic system is available for the Marinos' property, DES contends that the construction of the Marinos' residence was not only commenced in violation of both RSA 485-A and RSA 483-B, but is unapprovable unless the Marinos obtain land sufficient to allow for a septic system. Additionally, DES argues that the facts reveal that the overflow drain for the artesian well is located within the "bank" of Back Lake, as that term is defined in Env-Wt 101.06. The excavation and filling needed to install the drain pipe was commenced in violation of both the CSPA and the Wetlands Act.

In response to DES's claims, the Marinos counter that they do not need a permit under RSA 485-A:32 because by using a holding tank, the residence being constructed is not a building from which sewage or other wastes will discharge. They argue that DES's claim that they violated the CSPA fails as a matter of law, because: (1) they are the owners of a nonconforming, undeveloped lot of record, and are entitled to build a single family residential dwelling on their lot, in accordance with RSA 483-B:10, I; and (2) DES cannot impose conditions under the CSPA through allegations of noncompliance with RSA 485-A:32. The Marinos also claim that DES's failure to promulgate regulations providing for review of projects under RSA 483-B:10 violates their due process rights; and that RSA 483-B:10 is unconstitutional because gives the Commissioner of DES unfettered discretion to impose conditions without providing any meaningful objective standards. Finally, the Marinos contend that they did not violate RSA 482-A:3 by failing to obtain a "dredge and fill" permit to install the overflow drain pipe. They claim that DES has failed to allege facts sufficient to prove that the pipe is located within the bank of the lake, and that installation of the pipe triggers application of the CSPA.

I. Violation of the Wetlands Act

For the sake of simplicity, the Court addresses DES's claim that the Marinos violated the Wetlands Act first. After reviewing the pleadings, affidavits, and exhibits submitted by the parties, the Court finds that disputed issues of material fact exist, which prevent the Court from ruling as a matter of law. Specifically, the parties dispute whether the installation of the drain pipe required a

"dredge and fill" permit, and whether the pipe is located in the bank of Back Lake. Consequently, DES's motion for partial summary judgment is DENIED as to this issue.

The Marinos also allege that this Court should dismiss DES's claim that they violated RSA 482-A:3 by installing the overflow drain without obtaining a dredge and fill permit, because this claim is not alleged in DES's petition. In ruling on a motion to dismiss, the Court must determine "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." Hobin v. Coldwell Banker Residential Affiliates, Inc., 144 N.H. 626, 628 (2000) (quoting Miami Subs Corp. v. Murray Family Trust & Kenneth Dash P'ship, 142 N.H. 501, 516 (1997)). This threshold inquiry involves testing the facts alleged in the pleadings against the applicable law. See Williams v. O'Brien, 140 N.H. 595, 598 (1995). Dismissal is appropriate "[I]f the facts as pled cannot constitute a basis for legal relief." Hobin, 144 N.H. at 628 (quoting Buckingham v. R.J. Reynolds Tobacco Co., 142 N.H. 822, 825 (1998)). When the Court tests the pleadings, it "assume[s] the truth of the facts alleged in the plaintiff's pleadings and construes [a]ll reasonable inferences in the light most favorable to him." Hobin, 144 N.H. at 628 (citation omitted). However, the Court "need not accept allegations in the writ that are merely conclusions of law." Konefal v. Hollis/Brookline Coop. Sch. Dist., 143 N.H. 256, 258 (1998) (quoting Gardner v. City of Concord, 137 N.H. 253, 255-56 (1993)).

Applying this standard of review, assuming the truth of the facts alleged in DES's pleadings and construing all reasonable inferences in the light most favorable to it, the Court finds that DES's allegations are reasonably susceptible of a construction that would permit recovery on this claim. Accordingly, the Court DENIES the Marinos' request as to this issue.

II. Violation of the Water Pollution Act

Next the Court addresses DES's claim that the Marinos violated Section 32 of the Water Pollution Act. RSA 485-A:32, I (2001) states, in pertinent part:

> No person shall construct any building from which sewage or other wastes will discharge or construct a sewage or waste disposal system without *prior* approval of the plans and specifications of the sewage or waste disposal system by the department.[2]

(Emphasis added).

The Marinos fervently argue that this provision does not apply to them, because "[u]se of a holding tank negates any determination that wastes will discharge from the [b]uilding." The Court finds this argument incredulous. The undisputed facts show that the Marino's structure has water-related fixtures, including sinks and toilets. The building has plumbing to accommodate these fixtures. A pressure tank has been installed and is connected to the artesian well. These facts clearly indicate that the building constructed by the Marinos is one "from which sewage or other wastes will discharge." Moreover, the Marinos do not dispute that the holding tank was purchased to collect sewage and wastewater generated by use of the building. The only logical conclusion the Court can come to is that a discharge to a holding tank is a discharge within the meaning of RSA 485-A:32, I.

Additionally, RSA 485-A:32, I plainly requires that a person must obtain DES approval of their proposed sewage and waste disposal system prior to construction of a building. Since the Marinos' building is one "from which sewage or other wastes will discharge," and they commenced construction without obtaining approval for their proposed waste disposal system, they are in violation of RSA 485-A:32, I. Accordingly, with respect to DES's claim alleging violations of the Water Pollution Act, DES's motion for partial summary judgment is GRANTED, and the Marinos' cross-motion for partial summary judgment is DENIED.

III. Violation of the CSPA

Finally, the Court addresses DES's claim that the Marinos violated the CSPA. Resolution of this issue involves a determination of the interrelationship of several statutes. Therefore, in order to effectively address the parties' claims, a comprehensive review of the CSPA is warranted.

The CSPA, originally enacted in 1991, functions as an additional layer of regulation that overlays existing state and municipal permitting schemes, such as building permits, wetlands permits, and septic system approvals. See 1991 N.H. Laws 303:1. The purpose of the CSPA is to prevent "uncoordinated, unplanned and piecemeal development along the state's shorelines, which could result in significant negative impacts on the public waters of New Hampshire." RSA 483-B:1, IV (Supp. 2005).

When the Legislature enacted the CSPA, it created certain minimum standards for the

[2] By using the word "department," the statute is referring to DES. See RSA 485-A:2, III (2001).

development and use of the shorelands of the state's public waters. See generally RSA 483-B:9 (Supp. 2005). These standards serve several purposes, namely to: protect freshwater wetlands; control land uses; conserve shoreline cover and access points to inland waters; preserve the state's lakes in their natural state; promote wildlife habitat; protect the public's use of waters; and to conserve natural beauty and open spaces. RSA 483-B:2 (2001).

Because development of the state's shorelands can be regulated by many different entities, the Legislature required consistency with the CSPA. RSA 483-B:I (2001) requires state agencies to "perform their responsibilities in a manner consistent with the intent of [the CSPA]." Moreover, when a state agency or a local permitting entity issues work permits within the protected area, those permits "shall be issued only when consistent with the policies of [the CSPA]." Id.

Turning to the parties' arguments, the Marinos point out that RSA 483-B:6 defines DES's role in issuing permits for work within the protected shoreland, but explain that none of the permits enumerated in RSA 483-B:6 apply to their construction project.[3] The Marinos argue that the statute does not list RSA 485-A:32 as an approval for which DES is authorized to impose conditions under the CSPA. Further, the Marinos assert that RSA 483-B:10 allows owners of nonconforming, undeveloped lots of record to build a single family residential dwelling on the nonconforming lot, notwithstanding the requirements of the CSPA, subject to conditions, which, "in the opinion of the [DES] Commissioner, more nearly meet the intent of the [CSPA]." RSA 483-B:10 (2001). They contend that the CSPA does not state the mechanism for triggering review that would lead the

---

[3] RSA 483-B:6 (Supp. 2005) provides:

> I. Within the protected shoreland, any person intending to:
>
> (a) Engage in any earth excavation activity shall obtain all necessary local approvals in compliance with RSA 155-E.
> (b) Construct a water-dependent structure, alter the bank, or construct or replenish a beach shall obtain approval and all necessary permits pursuant to RSA 482-A.
> (c) Install a septic system as described in RSA 483-B:9, V(b)(1)-(3) shall obtain all permits pursuant to RSA 485-A:29.
>
> . . . .
>
> II. In applying for these approvals and permits, such persons shall demonstrate to the satisfaction of the department that the proposal meets or exceeds the development standards of this chapter. The department shall grant, deny, or attach reasonable conditions to a permit listed in subparagraphs I(a)-(e), to protect the public waters or the public health, safety or welfare. Such conditions shall be related to the purposes of this chapter.

Commissioner to impose such conditions.

DES responds by arguing that RSA 483-B:3, I mandates that state and local permits for work within the protected shorelands shall be issued only when consistent with the policies of the CSPA, and therefore, a request for septic approval or a wetlands permit automatically triggers review for consistency with the CSPA. In addition, DES argues that no specific reference to RSA 485-A:32 is required in the CSPA because all applications for septic and waste disposal permits must meet the requirements of RSA 485-A:29, and RSA 485-A:29 is specifically referenced in RSA 483-B:6. Thus, DES argues that it is obligated to consider consistency with the CSPA whenever it engages in review of a proposed sewage or waste disposal system within the protected shoreland. Finally, DES asserts that the Marinos do not qualify for the exemption under 483-B:10, because the exemption applies only if the development is not prohibited by other law. DES contends that because the Marinos commenced construction of the residence in violation of other state law (i.e., the Water Pollution Act), the exemption does not apply.

The well-established principles of statutory interpretation instruct that statutes must be interpreted according to their plain language, focusing on the statute as a whole, not on isolated words or phrases. Transmedia Restaurant Co. v. Devereaux, 149 N.H. 454, 462 (2003). When the language used in a statute is clear and unambiguous, there is no need to examine the provision's legislative history. Merrill v. Great Bay Disposal Serv., 125 N.H. 540, 542 (1984). "A widely accepted method of statutory construction is to read and examine the text of the statute and draw inferences concerning its meaning from its composition and structure." Id. (quoting State v. Flynn, 123 N.H. 457, 462 (1983)).

The Court agrees with DES that in this case, a request of septic approval automatically triggers DES review for consistency with the CSPA. RSA 483-B:3, I (2001) clearly states that "[s]tate and local permits for work within the protected shorelands shall be issued only when consistent with the policies of [the CSPA]." Even though Marinos septic system is not one necessitating a permit under RSA 483-B:6, I(c), the building that the Marinos have constructed requires a septic permit pursuant to RSA 485-A:32, and therefore the Marinos must obtain approval according to the directives contained in RSA 485-A:29. The fact that the Marinos are building a residence on an undeveloped lot of record rather than a new lot or subdivision does not negate the

fact that the construction project is within the protected shoreland. Taking into consideration the purpose of the CSPA, the Court determines that an application for septic approval in this situation should trigger review for consistency with the CSPA.

The Marinos correctly assert that they are the owners of a nonconforming, undeveloped lot of record, and are entitled to build a single family residential dwelling on their lot.[4] However, this right is not an absolute one. RSA 483-B:10 provides that:

> Nonconforming, undeveloped lots of record that are located within the protected shoreland shall comply with the following restrictions, in addition to any local requirements:
>
> I. Except when otherwise prohibited by law, present and successive owners of an individual undeveloped lot may construct a single family residential dwelling on it, notwithstanding the provisions of this chapter. Conditions may be imposed which, in the opinion of the commissioner, more nearly meet the intent of this chapter, while still accommodating the applicant's rights.

RSA 483-B:10, I (2001). The plain language of this section gives the DES Commissioner authority to review proposed development projects and impose conditions so that the project will adhere to the requirements of the CSPA as much as possible. The "triggering mechanism" for imposition of conditions by the Commissioner would be, in this case, submission of an application for an approved septic system design, or an application for dredging and filling the bank of Back Lake. Because these applications automatically trigger review for consistency with the CSPA, the Commission would then have the opportunity to review the development project and impose appropriate conditions, carefully balancing the intent of the CSPA with the Marinos' rights.

The Court rejects the Marinos argument that RSA 483-B:10 is unconstitutional because gives the Commissioner of DES unfettered discretion to impose conditions without providing any meaningful objective standards. RSA 483-B:10, I states that the Commissioner may impose conditions that "more nearly meet the intent of this chapter, while still accommodating the applicant's rights." The provisions of the CSPA are clearly spelled out not only in the

[4] The Court rejects DES's argument that the exemption contained in RSA 483-B:10 is inapplicable to the Marinos, because they commenced construction in violation of "other state law." Assuming the Marinos obtained all of the proper permits to install an approved septic system—and all other permits and approvals required—they would still be entitled to build a single family residential dwelling on their property, subject to review by the Commissioner. The fact that they did not do so prior to commencing construction of the building does not render the exemption inapplicable.

administrative rules, but most notably in the statute itself. For example, RSA 483-B:9 sets forth the minimum shoreland protection standards, and requires, among other things:

(1) that primary buildings constructed within the protected area meet a 50-foot setback requirement;
(2) fertilizers other than limestone may not be used within 25 feet of the reference line of any property;
(3) that all new structures within the protected shoreland be designed and constructed in accordance with DES rules pertaining to terrain alteration under RSA 485-A:17, in order to control erosion and siltation of public waters during and after construction; and
(4) that new structures within the protected shoreland be designed and constructed to prevent the release of surface runoff across exposed mineral soils;

RSA 483-B:9, II(b) & (d); V(c)(1)-(2) (Supp. 2005).

Moreover, the Court finds that the lack of specific administrative rules regarding the submittal of forms for use in conjunction with RSA 483-B:10 does not preclude enforcement against the Marinos. First, promulgation of rules under RSA 483-B:10 is unnecessary to carry out what the statute authorizes on its face. See Nevins v. New Hampshire Dep't of Res. & Econ. Dev., 147 N.H. 484, 487 (2002) (citing Stuart v. State, 134 N.H. 702, 705 (1991)). Second, as mentioned above, the triggering mechanism for review under the CSPA would have been application for a permit to install an approved septic system. This would have provided a specific mechanism for review of the Marino's project without the need for an additional application.

Based on the foregoing analysis, and because the Marinos have constructed their residential structure within 50 feet of Back Lake without DES authorization, the Court determines that the Marinos have violated the CSPA. Accordingly, DES's motion for partial summary judgment is GRANTED as to this issue. The Marinos' cross motion for partial summary judgment is DENIED.

SO ORDERED.

Dated: January 5, 2006

Timothy J. Vaughan,
Presiding Justice